SARAH A. PENCE ET AL.

IBLA 76-74, etc. Decided October 15, 1979

Appeals from decisions of the Alaska State Office, Bureau of Land Management (BLM), rejecting Native Allotment applications F-13715, etc.

Set aside and remanded.

1. Alaska: Native Allotments -- Alaska: Land Grants and Selections: Generally

   The regulations in 43 CFR 2627.4(b) provide that lands applied for by the State of Alaska will be segregated from all appropriations when the State files its application to select. A State selection will not extinguish valid prior existing rights. When Alaskan Natives can prove prior qualifying use and occupancy of selected lands, tentative approvals by the Secretary of the Interior of State land selections must be canceled.

2. Alaska: Native Allotments

   The right to seek an allotment is personal to one who has fully complied with the law and the regulations. An applicant for a Native allotment may not tack on use and occupancy of the land by his ancestors to establish his qualification. Claims based upon "aboriginal rights," or upon use and occupancy by ancestors, are simply not qualified.

3. Alaska: Native Allotments

   The substantial use and occupancy required by the Native Allotment Act must be achieved by the Native as an independent citizen for himself (or as head of a family) and not as

a minor, dependent child occupying or using the land in the company of his parents. This does not mean that a minor may not establish qualifying use or occupancy -- the issue is the nature of the use and occupancy. It must be achieved by an independent citizen in his own right and it must be at least potentially exclusive.

4. Administrative Procedure: Generally -- Alaska: Native Allotments -- Contests and Protests: Generally

Generally where BLM determines that an Alaska Native allotment application should be rejected because the use of the land by a minor child was not sufficiently established as an independent citizen in his own right, at least potentially exclusive of others, BLM shall issue a contest complaint pursuant to 43 CFR 4.451 et seq., and the guidelines set forth in Donald Peters, 26 IBLA 235, 83 I.D. 308 (1976).

APPEARANCES: Alaska Legal Services Corporation for appellants.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

These appeals have been consolidated because of the similarity of the material facts and the determining legal issues involved. 1/

Appellants have filed Native allotment applications pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 to 270-3 (1970) (repealed subject to pending applications) Alaska Native Claims Settlement Act, P.L. 92-203, section 18(a), 85 Stat. 710 (1971), and the implementing regulations at 43 CFR 2561. BLM rejected these applications because the lands applied for had been included within valid Alaska State selections which segregated the lands from Native allotment.

BLM noted in each case that the Native applicants were minor children occupying or using the land in company with their parents,

1/ The cases consolidated in this appeal are: (1) IBLA 76-74, Sarah A. Pence, F-13715, (2) IBLA 75-551, Ephim Moonin, AA 7260; (3) IBLA 75-559, Pauline Moonin, AA-7575; (4) IBLA 75-602, Lilian Elvsaas, AA-7535; (5) IBLA 75-606, Wayne D. Wilson, AA-8123; (6) IBLA 75-626, Walter Meganaek, Jr.

both at the time they alleged they were to have commenced their use and occupancy and at the time the lands were segregated from entry by the filing of the State selection application. BLM concluded that the Native applicants did not assert independent control and use of the lands prior to the State selections.

Although the BLM decisions in these cases were originally issued in 1975 and timely appeals were filed with this Board, action on these cases has been suspended during the pendency of pertinent litigation which was resolved in the decisions of Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978), and Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976). The plaintiff in those cases was the same Sarah A. Pence whose appeal is among those before us now.

Appellants contend, inter alia, that Native aboriginal rights preclude the segregative effect of the State selection applications and that tacking of ancestral use should be allowed. They object to the Bureau's rejections, arguing that a minor child may establish the requisite use and occupancy under the Native allotment law. Counsel for appellants specifically emphasizes that:

> As reflected by each proof of occupancy filed with each of the applications, each of the appellants is either an Indian, Aleut or Eskimo of full or mixed blood who resides in and is a Native of Alaska, and who is the head of a family or is at least twenty-one years of age. Each appellant made substantially continuous use and occupancy of the land in question for a period of five years. Each appellant, at their age of initial usage of their lands, was looked upon by their families as equals within the families and independent citizens. Each Appellant's ancestors were using and occupying their lands prior to their own use, hence avoiding the segregative effect of the various land encumbrances involved.

[1] The first consideration in these cases is the effect of the minor children's occupancy of lands that were subsequently included within Alaska State selection applications. The regulation provides that lands applied for by the State of Alaska will be segregated from all appropriations when the State files its application to select. 43 CFR 2627.4(b). The validity of this regulation has been recognized by the courts. State of Alaska, 73 I.D. 1 (1966), aff'd sub nom. Kalerak v. Udall, 396 F.2d 746 (9th Cir. 1968), cert. denied, 393 U.S. 1118 (1969). A state selection will not extinguish valid prior existing rights. Substantiated qualifying Native use and occupancy prior to the State selection applications would prevent these lands from being available for selection as "vacant, unappropriated and unreserved." State of Alaska v. John Nusunginya, 28 IBLA 83 (1976). Thus, the selections in question did not impugn to the Natives' qualifications for

their respective allotment lands if these Native applicants can prove they had already established their qualifications at the date of selection. However, the filing of a State selection application will segregate the land so as to preclude any subsequent claims, settlements or appropriations while the selection application is pending. Andrew Petla, 43 IBLA 186 (1978).

The Native Allotment Act of May 17, 1906, supra, authorized the Secretary of the Interior to allot not more than 160 acres of land in Alaska to an Indian, Aleut, or Eskimo who is both a resident and a Native of Alaska. The act also requires that the applicant must make proof satisfactory to the Secretary of the Interior of "substantially continuous use and occupancy of the land for a period of five years."

[2] Appellants seek to tack their use to that of their parents or other ancestors to remove the lands from the segregative effect of the conflicting state selections. We have repeatedly rejected this line of argument, holding that an allotment qualification is personal to one who has fully complied with the law and the regulations. We affirm our earlier rulings that an applicant for a Native allotment may not tack on use and occupancy of the land by his ancestors to establish his qualification. Herman Anderson, 41 IBLA 296 (1979); Sandra M. Pestrikoff, 23 IBLA 197 (1976); Lula J. Young, 21 IBLA 207 (1975); Susie Ondola, 17 IBLA 359, 361 (1974). Claims based upon "aboriginal rights," or upon use and occupancy by ancestors, are simply not qualified. Andrew Petla, supra; Ann McNoise, 20 IBLA 169, 173 (1975). Aboriginal claims have been extinguished by the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 (1976). State of Alaska et al, 41 IBLA 315, 86 I.D. 361 (1979).

[3] The substantial use and occupancy required by the Native Allotment Act must be achieved by the Native as an independent citizen for himself (or as head of a family) and not as a minor, dependent of his parents. Andrew Petla, supra; Arthur C. Nelson (On Reconsideration), 15 IBLA 76 (1974). This does not mean that a minor may not establish qualifying use or occupancy -- the issue is the nature of the use and occupancy. Sarah F. Lindgren, 23 IBLA 174 (1975). It must be achieved by an independent citizen in his own right and it must be at least potentially exclusive. John Nanalook, 17 IBLA 355 (1974); 43 CFR 2561.0-5(a).

[4] The factual determination of whether an applicant's use and occupancy is sufficiently independent in each of these cases to qualify can best be determined after relevant evidence is elicited at a hearing. John Moore, 40 IBLA 321, 86 I.D. 279 (1979). In Moore, supra, we again pointed out that the appropriate framework for hearings for such Native claims is the use of the Departmental contest procedure set forth in 43 CFR 4.451-1 to 4.452-9. These contest procedures as

first applied to Native claims in Donald Peters, 26 IBLA 235, 83 I.D. 308 (1976), reaffirmed; Donald Peters (On Reconsideration), 28 IBLA 153, 83 I.D. 564 (1976), have been approved as an appropriate procedure by the court in Pence v. Kleppe, supra.

Therefore, on remand of these cases BLM must review the facts, and where it is determined the Native has not qualified for an allotments, BLM should initiate contest proceedings in accordance with the guidelines of Donald Peters, supra, to allow these applicants their opportunity to prove the qualifying character of their alleged use and occupancy. 2/ Since the State of Alaska has an interest in the outcome of each proceeding due to the conflict of the various selections involved, the State should be given advance notice of any administrative decision to grant any portion of these allotments, so that it may elect to initiate private contest proceedings. State of Alaska, 41 IBLA 309 (1979). Likewise, if Government contests of these allotment claims are instigated by BLM, the State must also have an opportunity to participate, and therefore should be served with notice of each contest. The State, upon the filing of a proper motion, shall be allowed to intervene. Natalia Wassilliey, 17 IBLA 348, 352 (1974).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are set aside and the cases remanded for further proceedings consistent with this decision.

Edward W. Stuebing
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Joan B. Thompson
Administrative Judge

2/ We note that although all of these appellants were minors at the time the lands in question were segregated from appropriation, none of them was of such tender age as would preclude them from qualification as a matter of law. Cf. Herman Anderson, supra.